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STATE OF WASHINGTON

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IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

ECHO LUNDEBURG et. al.,

Petitioner,

vs.

JOLIE SCHONDER,

Respondent.

SUPPLEMENTAL BRIEF OF THE RESPONDENT

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TABLE OF CONTENTS

I.	STATEMENT OF FACTS	5
II.	ISSUES PRESENTED.....	9
III.	SUMMARY OF ARGUMENT.....	9
IV.	ARGUMENT	
	1.) Trial Court Did Not Abuse Its Discretion.....	11
	2.) Whether Assumption of Risk is Properly Before this Court	13
	3.) Validity of Preinjury Release.....	14
	4.) Whether Petition for Review is Properly Before this Court.....	18
	5.) Attorney's Fees.....	19
V.	CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

<i>Fenimore v. Donald M. Drake Constr. Co.</i> , 87 Wash.2d 85, 91, 549 P.2d 483 (1976).....	11
<i>Garcia v. Providence Medical Center</i> , 60 Wash. App. 635, 806 P.2d 766 (1991).....	11,13
<i>Herring v. Department of Social and Health Services</i> , 81 Wash. App. 1, 914 P.2d 67 (1996).....	14
<i>Medcalf v. The Department of Licensing</i> , 83 Wash. App. 8, 920 P.2d 228 (1996).....	11
<i>Scott v. Pacific West Mountain Resort</i> , 119 Wash.2d 484, 834 P.2d 6 (1992).....	15
<i>Vodopest v. MacGregor</i> , 128 Wash.2d 840, 913 P.2d 779 (1996).....	14,15,16,17,18
<i>Wagenblast v. Odessa Sch. Dist.</i> , 110 Wash.2d 845, 758 P.2d 968 (1988).....	15,16,17

Other

<i>ER 403</i> (2008).....	13
<i>ER 901</i> (2008).....	12
<i>ER 1002</i> (2008).....	12
<i>ER 1003</i> (2008).....	12
<i>ER 1004</i> (2008).....	12
<i>ER 1005</i> (2008)	12
<i>ER 1006</i> (2008)	12
<i>ER 1007</i> (2008)	12
<i>ER 1008</i> (2008)	12

<i>RAP 18.5</i> (2008).....	18
<i>RAP 13.4(a)</i> (2008).....	18
<i>R.A.P. 14.1</i> (2008).....	19
<i>R.A.P. 14.2</i> (2008).....	19
<i>R.A.P. 14.3</i> (2008).....	19
<i>R.A.P. 14.4</i> (2008).....	19

I. STATEMENT OF FACTS

This matter arose out of permanent cosmetic procedure performed by the Petitioner on November 11, 2001. (C.P. 4) The Petitioner was acting as the supervisor/trainer of the permanent cosmetic procedure performed on the Respondent. (C.P. 4) The aforementioned procedure was performed on the Respondent despite the fact that the Petitioner was not qualified to train or supervise the procedure. (C.P. 4) As a result of the permanent cosmetic procedure, the Respondent suffered pain, an unsightly appearance, disfigurement, scarring, and significant infection on her face and lips. (C.P. 4-5)

The Respondent brought suit against the Petitioner on April 15, 2003, and received a favorable verdict on October 6, 2005. (C.P. 1-8, C.P. 24) As a result of the verdict in favor of the Respondent, the Petitioner appealed the Trial Court's decision. (C.P. 30-35, C.P. 36-41)

This appeal primarily involves the Trial Court's decision to grant the Respondent's motion in limine excluding an unsigned preinjury release form. (R.P. 21-22) As a result of the Trial Court's ruling, the Petitioner was precluded at trial from presenting the defense of assumption of risk. (R.P. 21-22)

At trial the Petitioner sought to introduce into evidence a preinjury release form that was not signed by the Respondent or

filled out by the Respondent in anyway. (R.P. 17-22) The preinjury release form purported to inform the Respondent of the risks associated with the cosmetic procedure and release the Petitioner from liability for any negligent conduct that may occur during the cosmetic procedure. (R.P. 18)

The Respondent brought a motion in limine before the Trial Court seeking to have the unsigned preinjury release form excluded from trial as being unduly prejudicial to the Respondent. (R.P. 17) Respondent's counsel also argued that the unsigned preinjury release form was untimely submitted under ER 904, and that such preinjury release forms were invalid under Washington Law. (R.P. 17)

In response to the Respondent's argument, the Petitioner indicated that there would be testimony from two witnesses at trial supporting the fact that all patients of the Petitioner were required to sign a preinjury release form prior to having cosmetic procedures, and that the Respondent did in fact sign a preinjury release form similar to the exhibit the Petitioner was seeking to admit at trial. (R.P. 18-20) The Petitioner also indicated the intention to present testimony that the Respondent was employed by at the a business where the cosmetic procedure took place, the Respondent had access to her personnel file, and that the

Respondent's personnel file disappeared after the Respondent left employment. (R.P. 19)

After hearing argument of the respective counsel, the Trial Court indicated that without a preinjury release form signed by the Respondent it was unnecessary to address the ER 904 issue or the issue of whether the preinjury release form was appropriate under Washington Law. (R.P. 21) The only issue addressed by the Trial Court was whether the unsigned preinjury release form was unduly prejudicial to the Respondent. (R.P. 21)

After hearing the argument of counsel, the Trial Court made the following decision:

It seems to me that, in the absence of something pretty definite here, what we are dealing with is a certain amount of speculation as to where an original signed copy may or may not have gone. It injects kind of an odd aspect into the case as to the control of such document. It seems to me that, really, you know, the defendant, I would view, had a responsibility to maintain such a document. It is in their interest to do so.

Really, in my view, to have the injection of an unsigned document which is supported only by what I would view as being self-serving testimony of a defendant and a former released defendant in the case I think would be insufficient to even meet the foundational requirement to permit that to come in.

So leaving the other issues, I think just as a matter, you know, of authenticity and basic foundational requirements, I am not satisfied that those can be met. And for those reasons, I would exclude them.

(R.P. 21-22)

As a result of the Trial Court's decision to exclude the unsigned preinjury release form, the Petitioner was precluded from presenting any evidence or testimony at trial that the Respondent was informed of and understood the risks associated with the cosmetic procedure, and that the Respondent assumed those risks. (R.P. 22)

At trial, the Petitioner never moved the Trial Court for the admission of the unsigned preinjury release form, nor did the counsel for the Petitioner propose a jury instruction regarding the Petitioner's assumption of risk defense. The unsigned preinjury release form is not part of the appellate record. There is no jury instruction regarding assumption of risk in the appellate record. (See Clerk's Papers and Appellate Record Generally)

On appeal, the Appellate Court determined that the Trial Court had not abused its discretion by granting the Respondent's motion in limine excluding the unsigned preinjury released form. Further, the Appellate Court determined that even if the Petitioner would have presented a signed preinjury release form it could not be used as a defense in a negligence suit, as a preinjury release form cannot be the subject of negligent conduct.

The Petitioner now seeks this Court's review of the Appellate Court's decision.

II. ISSUES PRESENTED

1. Whether the Trial Court abused its discretion by granting the Respondent's motion in limine excluding the unsigned preinjury release form and all related testimony from trial.
2. Whether the defense of assumption of risk defense is properly before this Court, when the unsigned preinjury release form was never offered into evidence at trial and is not part of the appellate record.
3. Whether a preinjury release form releasing a party from negligent conduct is valid under Washington Law.
4. Whether the Petitioner followed the proper appellate procedure in seeking to have the Appellate Court's decision reviewed by this Court.
5. Whether the Respondent should be awarded attorney's fees and costs.

III. SUMMARY OF ARGUMENT

The primary issue on review is whether the Trial Court abused its discretion by granting the Respondent's motion in limine excluding the unsigned preinjury release form and all related testimony that the Respondent signed such form prior to undergoing the cosmetic procedure. The Trial Court did not abuse its discretion granting the Respondent's motion in limine as the unsigned preinjury release form did not meet the authentic and foundational requirements of evidence.

In this matter the Petitioner failed to produce a preinjury release form signed by the Respondent. The only evidence the

Petitioner was prepared to offer at trial was an unsigned preinjury release form and testimony from the Petitioner, and a previously released defendant, that the Respondent signed a preinjury release form similar to the form being offered by the Petitioner at trial.

Review of the Petitioner's assumption of risk defense is not properly before this Court, as the unsigned preinjury release was never offered into evidence, and the Petitioner never proposed a jury instruction regarding assumption of risk at trial. (C.P. 9-23) Therefore, the Petitioner's argument to this Court regarding the defense of assumption of risk is not properly before this Court, as the defense of assumption of risk was never presented at trial and is not part of the appellate record.

In the event that the Trial Court did abuse its discretion by excluding the unsigned preinjury release form and all related testimony at trial, the unsigned preinjury release form should have been excluded, as a preinjury release form cannot release a party from negligent conduct under Washington Law.

In addition to the arguments presented by the Petitioner in this matter, the Respondent raises the procedural issue that the Respondent was never served with a copy of the petition for review by the Petitioner.

IV. ARGUMENT

1.) The Trial Court Did Not Abuse Its Discretion By Granting the Respondent's Motion in Limine Excluding the Unsigned Preinjury Release Form and All Related Testimony.

a.) Standard of Review

Whether or not to grant a motion in limine is solely within the discretion of the Trial Court. *Garcia v. Providence Medical Center*, 60 Wash. App. 635, 806 P.2d 766 (1991). A Trial Court's decision to grant a motion in limine will only be reversed where there is an abuse of discretion. *Id.* at 642; *See also, Fenimore v. Donald M. Drake Constr. Co.*, 87 Wash.2d 85, 91, 549 P.2d 483 (1976). "A trial court abuses its discretion only when its ruling is based upon untenable grounds or untenable reasons." *Medcalf v. The Department of Licensing*, 83 Wash. App. 8, 16, 920 P.2d 228 (1996).

b. The Trial Court Did Not Abuse Its Discretion By Granting the Respondent's Motion in Limine, as The Rules of Evidence Support the Trial Court's Decision to Exclude the Preinjury Release Form.

In this matter, the Petitioner attempted to introduce into evidence an unsigned preinjury release form for the purpose of showing that the Respondent signed a similar form prior to undergoing the cosmetic procedure. (R.P. 16-24) In support of the

position that the Respondent signed a preinjury release form similar to the unsigned preinjury release form, the Petitioner sought to elicit testimony from the Petitioner and previously released defendant that the Respondent signed a similar preinjury release form. (R.P. 18)

Pursuant to the Respondent's motion in limine, the Trial Court excluded the unsigned preinjury release form and all related testimony, finding that the unsigned preinjury release form injected speculation into the trial and did not meet the authenticity and foundational requirements of evidence. (R.P. 21-22)

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by the evidence sufficient to support a finding that the matter in question is what the proponent claims." *ER 901* (2008). Further to meet the authentic requirement, the original document is required at trial. *ER 1002* (2008). However, the original document is not required under certain exceptions, none of which apply in this matter. *ER 1003; ER 1004; ER 1005; ER 1006; ER 1007; and ER 1008* (2008)

In this matter, the facts clearly show that the Petitioner was unable to produce the original signed preinjury release form, or present unbiased evidence supporting that such a signed document existed. Under the circumstances, it is clear that the Trial Court did not abuse its discretion by granting the Respondent's motion in

limine excluding the unsigned preinjury release form because the Petitioner could not meet the authenticity and foundational requirements.

Further, a Trial Court must exclude evidence “when its probative value is outweighed by the potential that the evidence will unduly prejudice the other party or the jury.” *Garcia*, 60 Wash. App. 642, 806 P.2d 766 (1991); *See also*, *ER 403* (2008). Under the facts and circumstances of this matter, it is clear that the Respondent would have been unduly prejudiced by the submission of an unsigned preinjury release form purporting to inform the Respondent of the risks associated with the procedure and absolving the Petitioner from any negligent conduct.

2.) Whether the Assumption of Risk Defense is Properly Before the Court, When the Preinjury Release Form was Never Offered into Evidence and is Not Part of the Appellate Record.

At trial, the Petitioner never offered the preinjury release form, which was the basis for the Petitioner’s defense of assumption of risk, into evidence. As a result of the Petitioner not offering the preinjury release form into the evidence at trial, the preinjury release form itself is not part of the appellate record.

In Washington, an Appellate Court has the right not to consider the admissibility of an exhibit when it is not part of the

appellate record. *Herring v. Department of Social and Health Services*, 81 Wash. App. 1, 21, 914 P.2d 67 (1996). Further, without the preinjury release being part of the appellate record for this Court to review, it is difficult, if not impossible, for this Court to determine whether or not the language of the preinjury release form is valid under Washington State Law.

Without the preinjury release form being part of the record, this Court should not consider whether or not the exhibit should have been admitted at trial or whether the preinjury release form would have operated to release negligent conduct by the Petitioner.

3.) Whether a Preinjury Release Form Releasing a Party from Negligent Conduct is Valid Under Washington State Law.

If the Trial Court abused its discretion by granting the Respondent's motion in limine, and if this Court overlooks the fact that the unsigned preinjury release form was never offered into evidence, the preinjury release form is not part of the appellate record, and no jury instruction was proposed regarding the defense of assumption of risk, then the unsigned preinjury release form violates public policy and is invalid under Washington Law.

Outside of voluntary high-risk sports, Washington Courts "have often found preinjury releases for negligence to violate public policy." *Vodapest v. MacGregor*, 128 Wash.2d 840, 849

913 P.2d 779 (1996). Washington Courts have also not allowed parties charged with a public duty, including the use of reasonable care, to insulate themselves from negligence by contract. *Id.* at 849-50 (1996); *See also, Scott v. Pacific West Mountain Resort*, 119 Wash.2d 484, 494-95, 834 P.2d 6 (1992); *Wagenblast v. Odessa Sch. Dist.*, 110 Wash.2d 845, 849-50, 758 P.2d 968 (1988). This is because “there are instances where public policy reasons for preserving an obligation of care owed by one person to another outweighs our traditional regard for the freedom of contract.” *Vodopest*, 128 Wash.2d at 850, 913 P.2d 779 (1996) (*citing, Wagenblast*, 110 Wash.2d at 849, 758 P.2d 968 (1988); *Scott*, 119 Wash.2d at 493; 834 P.2d 6 (1992)).

The Supreme Court in *Wagenblast*, set forth six factors to consider when determining whether or not an exculpatory clause agreement violates public policy. *Vodopest*, 128 Wash.2d at 854-55, 913 P.2d 779 (1996). The factors set forth in *Wagenblast* are not exclusive list of considerations for the courts, but rather a rough outline taken from other cases where exculpatory clauses have not been allowed. *Vodopest*, 128 Wash.2d at 855, 913 P.2d 779 (1996). An exculpatory clause may be found to contravene public policy where one or more of the factors are present. *Id.* at 855 & 860.

Two of the factors stated in *Wagenblast* are relevant to the present matter: (1) the transaction concerns a business of a type generally thought to be suitable for public regulation, and (2) as a result of the transaction, the person or property is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. *Id.* at 854-55; *See also, Wagenblast*, 110 Wash.2d at 851-52, 758 P.2d 968 (1988). The Respondent in this matter was placed under the control of the Petitioner and subject to the risk of carelessness by the Petitioner and the Petitioner's agents. Under the circumstances, the Petitioner owed the Respondent a duty of ordinary care.

The Respondent brought an action against the Petitioner for damages as a result of the Petitioner's negligent conduct. The Supreme Court stated in *Vodopest*, "[w]e wish to be very clear that it is only *negligent* conduct which cannot be the subject of a preinjury release." *Vodopest*, 128 Wash.2d at 861, 913 P.2d 779 (1996). However, under certain conditions a preinjury release may be rendered enforceable with regard to negligent conduct. *Id.* at 853.

The Petitioner argues that the Respondent was made aware of the potential risks associated with the cosmetic procedure and assumed those risks associated with the procedure, therefore the unsigned preinjury release form should have been admitted into

evidence to show the Respondent's knowledge of the risk associated with procedure. However, the Supreme Court has made clear the distinction between when a preinjury release may be enforceable with regard to negligent conduct. In *Vodapest*, the Supreme Court stated,

insofar as the Defendant attempts to use the agreement to release herself from negligent acts performed in furtherance of medical research, it is unenforceable. This does not necessarily mean the release would be void for all purposes. A release may be effective for some, but not all, purposes. For example, a release may be effective for negligent conduct but would be unenforceable as it relates to gross negligence or willful conduct. In the present case, if the plaintiff had fallen asleep on a steep trail as the result of the Defendant's negligence, the release may have been effective to bar a cause of action for negligence (because the context would be only a high-risk sport) However, if the Defendant had misused a piece of medical equipment in the course of a medical experiment, the release would not be effective to bar the action if contracts which release a medical researcher for negligence are void as violative of public policy.

Vodapest, 128 Wash.2d at 853, 913 P.2d 779 (1996).

Being that the Respondent was placed under the control of the Petitioner and her agents, and subject to their carelessness, it is clear that under the *Wagenblast* factors the preinjury release in this matter, whatever the content may be, would violate public policy. Further it would follow that the preinjury release form in this matter would have been invalid under Washington Law even if admitted because the Respondent was injured as a result of the Petitioner and the Petitioner's agent's misuse of medical

equipment; which was negligent conduct by the Petitioner.

Negligent conduct cannot be the subject of a preinjury release.

Vodopest, 128 Wash.2d at 861, 913 P.2d 779 (1996).

4.) Whether the Petitioner Followed Appropriate Rules of Appellate Procedure in Seeking to Have the Appellate Court's Decision Reviewed by this Court.

RAP 18.5(a) (2008) requires that a "person filing a paper must, at or before the time of filing, serve a copy of the paper on all parties, amicus, and other persons who may be entitled to notice." In addition to this requirement, a party is required to provide and file proof of service. *RAP 18.5(b)* (2008)

The filing and services requirements must be effectuated within the 30-days after the Appellate Court decision becomes final; as the petition for review to the Supreme Court must be filed and served within 30-days after the Appellate Court decision becomes final. *RAP 13.4(a)* (2008)

After the Appellate Court decision became final in this matter, the Petitioner filed a petition for review to the Supreme Court of Washington; however, at no time did the Petitioner serve a copy of the petition for review on the Respondent, nor did the Petitioner file a certificate of service.

The Petitioner's failure to comply with the filing and service requirements makes the petition for review currently before this Court untimely.

5.) The Respondent Should be Awarded Attorney's Fees and Costs.

Should the Respondent be the prevailing party upon review, the Respondent requests that attorney's fees and costs be awarded to the Respondent. *R.A.P. 14.1; R.A.P. 14.2; R.A.P. 14.3; and R.A.P. 14.4* (2008)

V. CONCLUSION

The Trial Court only addressed the evidentiary authentic and foundational issues regarding the unsigned preinjury release, and whether under the facts and circumstances of this matter the Respondent would be unduly prejudiced by the admission of the unsigned perjury release form purporting to inform the Respondent of the risks associated with cosmetic procedure and release the Petitioner from liability for any negligent conduct. Pursuant to the Respondent's motion in limine, the Trial Court excluded the unsigned preinjury release form finding the exhibit prejudicial to the Respondent and to lack the authentic and foundational requirements of evidence.

Therefore, the only issue properly before this Court is whether or not the Trial Court abused its discretion by granting the

Respondent's motion in limine excluding the unsigned preinjury release form and all related testimony. The facts and appellate record clearly show the Trial Court did not abuse its discretion, and the decision of the Trial Court and Court of Appeals should be affirmed.

DATED this 14th day of April, 2008.

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